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SUPREME COURT U. S.

Supreme Court of the United States,

OCTOBER TERM, 1906.

No. 240.

WINTHROP ASTOR CHANLER, THOMAS T. SHERMAN, AS COMMITTEE FOR JOHN ARMSTRONG CHANLER ET AL.,
Plaintiffs-in-Error,

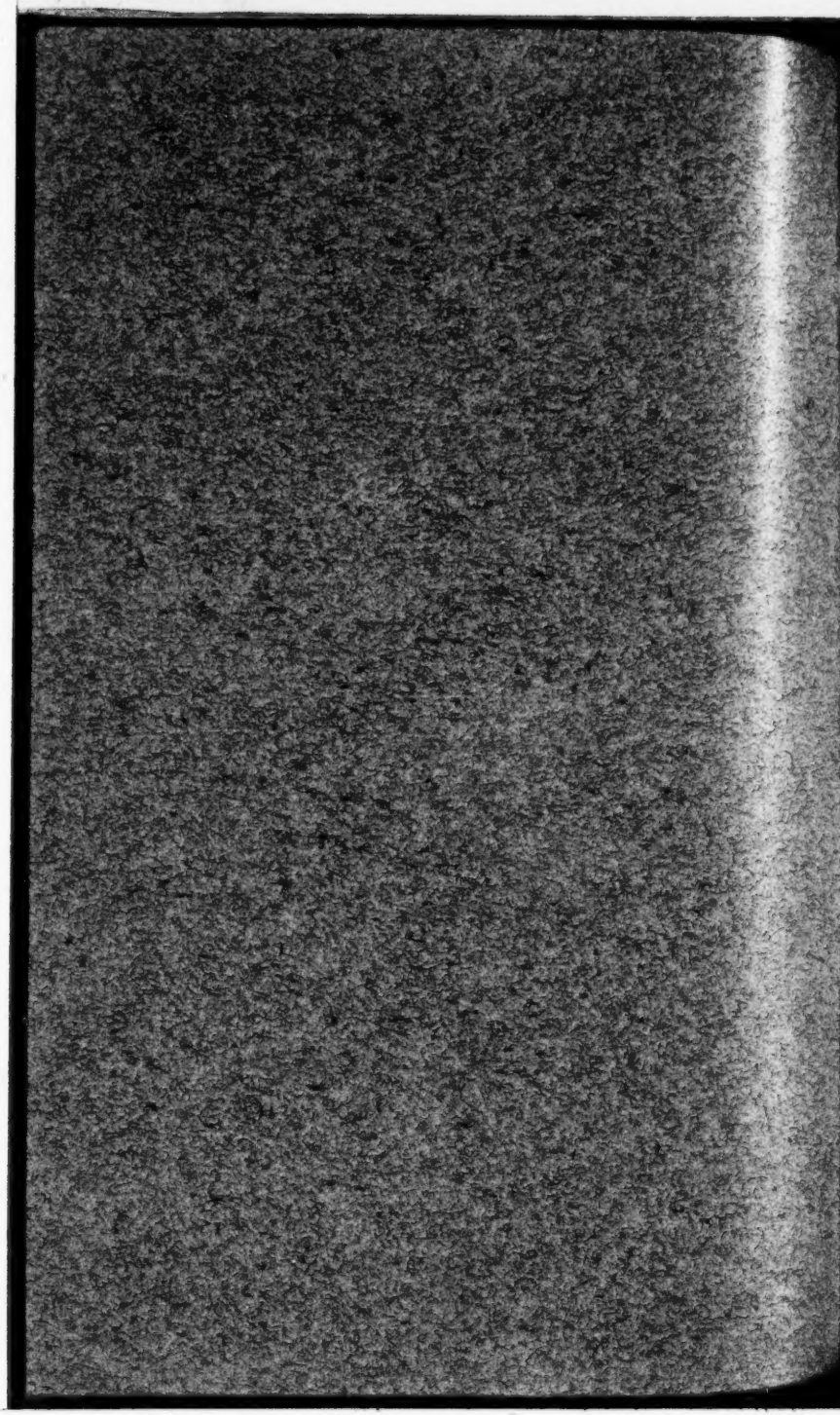
vs.

OTTO KELSEY, COMPTROLLER OF THE STATE OF NEW YORK,
Defendant-in-Error.

PETITION FOR RE-HEARING.

LUCIUS H. BEERS,
Counsel for Plaintiffs-in-Error.

EVENING POST JOB PRINTING OFFICE, NEW YORK.



EVENING POST JOB PRINTING OFFICE, NEW YORK

Supreme Court of the United States.

No. 240—OCTOBER TERM, 1906.

WINTHROP ASTOR CHANLER, THOMAS T. SHERMAN, as Committee for JOHN ARMSTRONG CHANLER *et al.*,
Plaintiffs in Error,

vs.

OTTO KELSEY, Comptroller of the State of New York,
Defendant in Error.

TO THE HONORABLE THE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The plaintiffs in error in this cause respectfully present their petition for rehearing and submit the following reasons why their prayer should be granted:

I.—The question involved in this case was as to the constitutionality of the provisions of an amendment to the Transfer Tax Law of the State of New York (Chap. 284, Laws of 1897) under which the defendant in error has demanded from your petitioners the sum of $113,449.40 as an alleged succession tax on property which passed by deeds made in 1844, 1848, 1849 and 1865 by William B. Astor,

the ancestor of your petitioners. Said property was appointed under powers of appointment given to Laura A. Delano by those deeds.

II.—The Court of Appeals of the State of New York has held that the New York Transfer Tax Law with its amendments was not an exercise of the general taxing power of that State, but must be regarded only as imposing a succession tax (*Matter of Pell*, 171 N. Y., 48) and in the present case that Court has followed its earlier decision (*Matter of Delano*, 176 N. Y., 486).

III.—This Court and the New York Court of Appeals have held that the power of the several states to impose succession taxes is not subject to the same limitations under the Constitution of the United States as their general power of taxation, because the imposition of a succession tax is a part of the power possessed by the states with respect to the succession to property left within their jurisdiction when the owner of such property has died; and this Court has held that the power of one of the states to impose a succession tax depends on its power to regulate the succession to the particular property involved by reason of the death of the former owner of such property. (*Mager* v. *Grima*, 8 Howard, 490, 493; *United States* v. *Perkins*, 163 U. S., 625, 627; *Knowlton* v. *Moore*, 178 U. S., 41, 56; *Plummer* v. *Coler*, 178 U. S., 115, 124; *Matter of Sherman*, 153 N. Y., 1.)

IV.—Since the delivery of said deeds in 1844, 1848, 1849 and 1865, no owner of the property appointed to your petitioners has died, and said property has not come within the reach of any succession laws or statute of wills of the State of New York.

V.—Said property was not the property of said Laura A. Delano; but the Legislature of the State of New York, enacted by Chapter 284 of the Laws of 1897, that appointments should be deemed to be transfers caused by the death of an owner, although not so in fact, and further enacted that a portion of the property should be taken by the State as though such property had belonged to the donee of the power, although that was not the fact. (Chap. 284, Laws of 1897; General Tax Law of New York, Sec. 242.)

VI.—The decision of the Court of Appeals of New York depriving your petitioners of a portion of their property in the form of a succession tax was based wholly on the provisions of said Chapter 294 of the Laws of 1897 (*Matter of Delano*, 176 N. Y., 486) and said Court of Appeals has held that if the said Act of 1897 did not exist, the laws of the State of New York would not permit any portion of property appointed as aforesaid to be taken in the form of a succession tax. (*Matter of Harbeck*, 161 N. Y., 211.)

VII.—The power of the State of New York to exact the succession tax is limited to a transfer taking effect upon the death of an owner, but in this case, your petitioners have not succeeded to any property upon the death of an owner, and your petitioners respectfully submit that the provisions of Chapter 284 of the Laws of 1897 are unconstitutional if intended to apply to this case, because the power of the State to impose a succession tax depends upon the actual existence of facts, which that statute declares shall be deemed to exist, but which, in this case, did not in fact exist.

If Chapter 284 of the Laws of 1897 is regarded as in any respect an exercise of the general taxing power of the State of New York, that statute vio-

lates Section 1 of the fourteenth amendment to the Constitution of the United States by reason of its inequalities and discriminations. The constitutional objections to said Act in this regard have not been presented to this Court in this case, because it has been assumed that such statute would be considered only as imposing a succession tax, and such constitutional objections have not been considered in earlier succession tax cases in this court for the reason that this is the first of such cases to reach this court where the owner of the property in question has not died. If the general taxing power of the State of New York has been considered to play any part in the upholding of this exaction, your petitioners respectfully pray to be allowed to present their argument on this subject, the highest Court of the State of New York having upheld your petitioners' contention that the Transfer Tax Act is unconstitutional by reason of its discriminations, if regarded as an exercise of the State's general power of taxation. (*Matter of Pell*, 171 N. Y., 48).

VIII.—Your petitioners respectfully submit that the decision in *Orr* v. *Gilman*, 183 U. S., 278, referred to in the opinion of this Court, does not apply here, because in that case, the power was created by the will of the owner of the property and became operative only through his death, while in this case, the power was created by the deeds which took effect on delivery, and neither the donor nor the donee of the property were at the time of their death the owner of the interest upon which it is sought to impose the tax. And your petitioners further respectfully submit that the decision of the Court of Exchequer in *Attorney-General* v. *Upton*, L. R. 1 Ex., 224, referred to in the opinion of this Court, does not apply in this case, because the question here is not as to the interpre-

tation of the statute, but whether the Constitution of the United States forbade the passing of the statute—a question which could not arise in a Court in Great Britain.

IX.—William B. Astor in making the grants and creating the powers contained in said deeds, and in providing for the exercise of said powers, did not, in any case, subject the property affected to any of the laws of the State of New York affecting the making of wills or affecting the succession to property of deceased persons, but the estates granted and the powers given by, and exercised under, said deeds depended for their validity on the force of the contracts evidenced by said deeds. (Record on Appeal, pp. 84-93).

X.—William B. Astor by said deeds granted to Laura A. Delano the power to appoint the whole of the property therein referred to, and this Court has expressly said that such a power was a contract right and that a State statute impairing that right would violate the Constitution of the United States. (*Dartmouth College* v. *Woodward*, 4 Wheaton, 518, 698).

XI.—The trustees of the trusts created by said deeds were required by the terms thereof to deliver to your petitioners all of the property in their possession as such trustees, but said trustees have refused to pay and deliver to your petitioners more than 95 per cent. of said property, and have alleged, as an excuse for not paying or delivering the remaining five per cent. thereof, that under said statute of 1897, the Legislature of the State of New York has required them to retain the remaining five per cent. for the State Treasury. Such refusal on the part of such trustees is in violation of a decision of this Court to the effect:

> "That no State, by virtue of its taxing power, can say to a debtor, 'You need not pay to your creditor all of what you have promised to him. You may satisfy your duty to him by retaining a part for yourself, or for some municipality, or for the State treasury.'"
>
> (*Murray* v. *Charleston*, 96 U. S., 432, 444.)

Your petitioners therefore respectfully pray that this case be restored to the docket, and that a rehearing be ordered.

And the undersigned, being a member of the bar of this honorable Court, humbly conceives it to be proper that the questions arising upon the writ of error herein should be reheard by this Court, if this Court should see fit to so order, and respectfully certifies accordingly.

LUCIUS H. BEERS,
Counsel for Plaintiffs in Error.

DEFENDANT'S BRIEF

Supreme Court of the United States.

WINTHROP ASTOR CHANLER, THOMAS T. SHERMAN, as Committee for John Armstrong Chanler, *et al.*, Plaintiffs in Error, vs. OTTO KELSEY, Comptroller of the State of New York, Defendant in Error.	October Term, 1906. No. 240.

BRIEF FOR DEFENDANT IN ERROR.

Statement of Facts.

This case arises on writ of error to the Surrogate's Court of the County of New York in the State of New York, to review the determination of the Court of Appeals of the State of New York, affirming an order of said Surrogate's Court imposing a tax on certain remainders appointed to the plaintiffs in error by and under the last will and testament of Laura Astor Delano, deceased.

On September 10th, 1844, John Jacob Astor, William B. Astor and Margaret his wife, made an instrument in writing in the nature of a deed (pp. 89-92) by which they transferred and conveyed to Laura, the daughter of said William B. and Margaret (afterwards Laura Astor Delano) in contemplation of her marriage, certain real and personal

property therein described, for her life. As to the personal property, said instrument contained the following clause by which said daughter, Laura, was given a power of appointment over said sum and provision made for its disposition in case of her failure to exercise such power (p. 90):

> "And in consideration as aforesaid the said "John Jacob Astor and William Backhouse "Astor do give and grant the capital of the "said One hundred and fifty thousand dollars, "on the death of the said Laura to her surviv- "ing issue, in such manner and proportions as "she may in her discretion (as by an express "power) appoint by instrument in the nature "of a will; and in default of such appointment "to such issue, in equal shares, *per stirpes;* "Provided, however, that an express discre- "tionary power is hereby granted to her to "give not exceeding one-fourth part thereof by "will to her husband surviving her; And in "case the said Laura shall leave no surviving "issue, or in case any of such issue shall de- "part this life under the age of twenty-one "years, then the share or shares which would "have gone to such issue, shall be and are "hereby given to the persons who would be the "legal representatives of the said Laura by "consanguinity only, and if the said Laura "shall die leaving no issue, the further express "power is given to her to appoint the said cap- "ital to and amongst such representatives, or "any of them in such shares and manner as she "may think fit and to give to her husband not "exceeding one-fourth part as aforesaid."

In the same deed, as to the real estate therein conveyed, there was the following provision (p. 91):

> "Provided, however, and power is hereby "granted unto the said Laura in her discretion "to give the said lands or any share or part "thereof to and amongst her said issue or "heirs, in such manner and proportion as the "may appoint by instrument in its nature tes

"tamentary to be acknowledged by her as a
"deed and in presence of two witnesses or
"published by her as a will."

On the 30th day of September, 1848, the said William B. Astor and wife conveyed to their daughter Laura, then Laura Astor Delano, certain real estate therein described for and during her life, with power of appointment as to said property as follows (p. 85):

"Provided, however, and power is hereby
"granted unto the said Laura, in her discre-
"tion to give the said land and premises or
"any share or part thereof to and amongst her
"said issue, brothers, sister Alida, or their
"issue, in such manner and proportions as
"she may appoint by instrument in its nature
"testamentary to be acknowledged by her as
"a deed in the presence of two witnesses or
"published by her as a will."

On the 6th day of September, 1849, the said William B. Astor by deed transferred to trustees therein named certain certificates representing $50,000 of the public debt of the State of Ohio, to hold the same in trust for the benefit of Laura Astor Delano during her life, and at her death to transfer and convey the capital of the said stock to her issue, but in case she left no issue, then to her surviving brothers and sister Alida and to the issue of any of them who died leaving issue, but said instrument contained a power of appointment to the said Laura Astor Delano as follows (p. 88):

"Provided, however, that it shall be lawful
"for the said Laura, by any instrument exe-
"cuted duly as a will of personal estate, to
"dispose of the said capital unto and amongst
"her issue, brothers, sister and their issue, in
"such shares and proportions as she may
"think fit and upon such limitations, by way
"of trust or otherwise as in her discretion may
"be lawfully devised."

On the 28th day of October, 1865, the said William B. Astor by another instrument in writing made between himself and certain persons therein named as trustees, and Laura Astor Delano, transferred to the trustees one hundred thousand dollars of the public debt of the State of New York and one hundred thousand dollars of the public debt of the State of Ohio, to receive the income therefrom and apply it to the use of said Laura Astor Delano during her life, with certain provisions for its disposition in case the said Laura Astor Delano should not exercise a power of appointment therein given to her as follows (p. 94):

> "Provided, however, and these presents are "on the limitations and condition further: "That it shall be lawful for my said daughter, "party of the third part, by any instrument "testamentary in its nature and executed as "such, to give, appoint and bequeath the said "sum now settled and any part and parcel "thereof to and amongst my children or their "issue or any one or more of them who may "survive her in the event of her death without "surviving issue, or of the death of such issue "under the age of twenty-one years.
>
> "Provided also that my said daughter may "in her discretion to be exercised or withheld "at her pleasure, by an instrument in the "nature of a will give any amount not exceeding one-half of the capital to her husband if "he shall survive her."

By the third clause of his last will and testament said William B. Astor also bequeathed certain personal estate to said Laura Astor Delano for life, with a power of appointment as follows (p. 96):

> "And I give to each of the said daughters "and to my grand-daugher the power, notwithstanding the above limitations of capital, to "dispose thereof to and amongst her kindred "of my blood or any of them in such sums or "proportions as she may think fit, so that the

"same may be done by an instrument of ap-
"pointment testamentary in its character and
"execution."

The codicil of January 19th, 1865, contained a bequest to his daughter, Mrs. Alida Carey, for life "with the like power of appointment as is contained in second and third clauses of my said will," and said codicil also contained another bequest to his daughter, Laura Astor Delano, for life, "with a like limitation on her death and a like power of appointment."

William B. Astor died on the 24th day of November, 1875.

Laura Astor Delano died on the 15th day of June, 1902, leaving no husband, no children nor the issue of any deceased children surviving her.

She left a last will and testament and codicil which were admitted to probate by one of the Surrogates of the County of New York on the 14th day of October, 1902. (Pp. 75-82.)

In and by said will she exercised the powers of appointment vested in her by said above-mentioned deeds and will of her father.

A proceeding was instituted before the Surrogate of the County of New York for the appointment of an appraiser to ascertain the amount of the tax upon the property transferred and appointed by said last will and testament of said Laura Astor Delano.

The appraisal was thereafter made; said Appraiser filed his report to the Surrogate, and an order fixing the amount of said tax was duly entered by the Surrogate on the 22d day of March, 1905. (Pp. 32-37.)

From that order an appeal was taken to the Appellate Division of the Supreme Court, First Department, where the order of the Surrogate was

unanimously affirmed, without opinion (p. 110), and from that order of affirmance an appeal was taken to the Court of Appeals.

The Court of Appeals affirmed the order of the Appellate Division and of the Surrogate, and it is from that order of affirmance that this appeal or Writ of Error is taken.

The question before this Court can be stated in no better language than that used by Judge Vann of the Court of Appeals of the State of New York upon appeal of Arthur Astor Carey from the order of the Surrogate refusing to dismiss the proceedings as to him (*Matter of Delano*, 176 N. Y., 486):

> "This appeal presents the question whether "the legislature is prohibited by the Constitu- "tion, State or Federal, from passing an act "to impose a transfer tax upon the exercise, "by a last will and testament, of a power of "appointment derived from a deed, executed "before the passage of any statute imposing a "tax upon the right of succession to the prop- "erty of a decedent."

FIRST POINT.

The instrument by which Mrs. Delano exercised the powers of appointment was a "will." (See Will, pp. 75-82.)

At the time of the execution of the deeds of 1844, 1848 and 1849, the laws of the State of New York provided:

> "All persons except idiots, persons of un- "sound mind, married women, and infants, "may devise their real estate, by a last will "and testament duly executed according to the "provisions of this title."

Revised Statutes, § 1, Art. 1, Title 1, Chap. 6, part 2.

"Every male person of the age of eighteen "years or upwards, and every female not being "a married woman of the age of sixteen years "or upwards, of sound mind and memory, and "no others, may give and bequeath his or her "personal estate, by will in writing."

Revised Statutes, § 21, Art. 2, Title 1, Chap. VI, Part II.

These provisions of the Revised Statutes became law January 1, 1830.

Standing alone these provisions would prohibit a married woman at that time from making a will, but there came into existence on the same day another statute which provided as follows:

"A married woman may exercise a power "during marriage by grant or *devise*, as may "be authorized by the power, without the con- "currence of her husband, unless by the terms "of the power its execution by her during mar- "riage is expressly or impliedly prohibited."

Revised Statutes, Part 2, Chap. I, Title II, Art. III, § 110, or 1 R. S., 735, § 110.

At the time of the making of the deeds herein Laura Astor Delano had the right given by Section 110 above, to make a will for the purpose of exercising the power given by said deeds.

William B. Astor is presumed to have made these deeds with knowledge of this provision of law.

Since both the Statute of Wills and the article relating to Powers went into effect on the same day, there can be no question of the former nullifying the latter. That such is the case, and that section 110 became valid and effective for the purpose for which it was created is shown by the decision of Chancellor Walworth in *Strong* v. *Wilkin* (1 Barb. Ch., 1), wherein he says, at page 13:

"For the article of the Revised Statutes in "relation to powers expressly authorizes a "married woman to execute a power, either by "grant or by devise as may be authorized by "such power. And she is also authorized to "take a general and beneficial power to dis- "pose of lands during marriage. It is wholly "impossible, therefore, to suppose that the "legislature could have intended to give to "a *feme covert* this right to dispose of real "estate by devise, in which she had a beneficial "interest under a power, and to deprive her of "the right to make a similar disposition of her "personal property by will, where such prop- "erty was held by trustees for her separate "use, with power to appoint same by will at "her death."

To the same effect is *Wadhams* v. *American Home Missionary Society* (10 Barb., 597), where it is said, at page 604:

"It cannot be denied that a power can be "conferred on and held by a married woman. "If there ever was any doubt on that point, it "is effectually removed by the Revised Stat- "utes (Part 2, Chapter 1, Title 2, Art. 3, 1 "R. S., 755) in treating of powers, for the "109th Section expressly recognizes such ca- "pacity in her, and the 110th Section provides "that a married woman may execute a power "during her marriage, by grant, or devise, as "may be authorized by the power, without the "concurrence of her husband."

Again in the same opinion, the Court referring to the provisions in both the Statute of Wills and the Statute of Powers relating to married women, says: "It should not be assumed that the legislature in- "tended to prohibit, in the one section, the exercise "of a power which was clearly granted in "another."

This case, though reversed on appeal because of a defect in the provisions of the ante-nuptial settle-

ment, was sustained so far as it deals with the rights of married women to exercise a power of appointment by a devise contained in a last will and testament. Judge Denio saying, in 12 N. Y., at page 422:

> "It follows that a married woman cannot in "England, and could not in this country until "the passage of the act respecting married "women in the year 1849, make a will of her "real estate, except by virtue of a power or by "way of appointing a use; but where she is "clothed with such a power, her coverture "forms no impediment to the transaction."

As late as 1877, in *Albrecht* v. *Pell* (11 Hun, 127-129), dealing with a trust which had been exercised in 1841, the Court took occasion to reaffirm the above doctrine, although the decision of the case was upon another point. Daniels, J., saying:

> "Before that (Married Woman's Act of "1849) her will was deemed sufficient to de-"vise an equitable estate, under the authority "of such a power, which would entitle the "devisee, through the intervention of a court "of equity, to a conveyance of the legal estate "from the heir."

While there is some conflict in the decisions as to whether under Section 110 of the Statute of Powers a married woman can exercise a power of appointment by deed or will, which relates to personalty only, this question is of no importance in the present case for the reason that on April 11th, 1849, before the deed of September 6th relating to personalty was made, the legislature enacted the following statute conferring upon married women the right to make a will or deed of real or personal property:

> "Any married female may take by inherit-"ance or by gift, grant, devise or bequest, from "any person other than her husband and hold

"to her separate and sole use and convey and "devise real and personal property, and any "interest or estate therein, and the rents, is- "sues and profits thereof in the same manner "and with like effect as if she were unmarried, "and the same shall not be subject to the dis- "posal of her husband, nor be liable for his "debts." (Laws 1849, Chap. 375, Sec. 3.)

In addition to the privilege of making a will exercising the powers of appointment granted her, which Laura Astor Delano enjoyed from the time of the creation of such powers by virtue of Section 110 of the Statute of Powers and Sec. 3 of Chap. 375, Laws of 1849, as set forth in the preceding paragraph, her disability, as a married woman, to make a will of realty or personalty under the Statute of Wills was entirely removed in 1867 by the enactment of the following statutes:

"Section 3. The first section of Article 1, "Title 1, Chapter six of the Second part of the "Revised Statutes is hereby amended by strik- "ing out the words 'married women' so that "such section shall read as follows: 'Section "'1. All persons, except idiots, persons of un- "'sound mind and infants, may devise their "'real estate, by a last will and testament, "'duly executed, according to the provisions "'of this title.'" (Section 3, Chap. 782, Laws of 1867.)

"Section 4. The 21st Section of Article 2, "Title 1, Chapter 6 of the Second Part of the "Revised Statutes is hereby amended by strik- "ing out the words 'not being a married "'woman,' so that such section shall read as "follows: 'Section 21. Every male person of "'the age of eighteen years or upwards, and "'every female of the age of sixteen years or "'upwards, of sound mind and memory, and no "'others, may give and bequeath his or her "'personal estate, by will in writing.'" (Section 4, Chap. 782, Laws of 1867.)

SECOND POINT.

The decision of the Court of Appeals of the State of New York that the statute, Chapter 284 of the laws of 1897, sub-division 5 of Section 220 of the Tax Law, does not violate any provision of the Constitution of the State of New York will be regarded as conclusive upon this Court upon that question.

Orr v. *Gilman*, 183 N. Y., 278.
People ex rel. Met. St. Ry. Co. v. *N. Y. State Board of Tax Com'rs.*, 199 U. S., 1.
Seneca Nation v. *Christie*, 162 U. S., 283.
Missouri R. R. v. *Haber*, 169 U. S., 613.
Smiley v. *Kansas*, 196 U. S., 447.
Hibben v. *Smith*, 191 U. S., 310.

THIRD POINT.

The legislature of the State of New York had the right to enact Chapter 284 of the laws of 1897 (now sub-division 5 of Section 220 of the Tax Law), and the same is not a violation of any of the provisions of the Constitution of the United States.

The provision in question which is referred to as the amendment of 1897, is as follows:

"Whenever any person or corporation shall "*exercise a power of appointment derived from* "*any disposition of property made either be-*

"*fore or after the passage of this act, such ap-*
"*pointment when made shall be deemed a*
"*transfer taxable under the provisions of this*
"*act* in the same manner as though the prop-
"erty to which such appointment relates be-
"longed absolutely to the donee of such power
"and had been bequeathed or devised by such
"donee by will; and whenever any person or
"corporation possessing such a power of ap-
"pointment so derived shall omit or fail to
"exercise the same within the time provided
"therefor, in whole or in part, a transfer tax-
"able under the provisions of this act shall be
"deemed to take place to the extent of such
"omissions or failure, in the same manner as
"though the persons or corporations thereby
"becoming entitled to the possession or enjoy-
"ment of the property to which such power re-
"lated had succeeded thereto by a will of the
"donee of the power failing to exercise such
"power taking effect at the time of such omis-
"sion or failure."

The legislature by this act does not impose a tax upon property, but it does impose a tax upon the exercise of a power of appointment.

It can make no difference when the right was given to the exercise of the power, or how it was created. No tax is made upon the giving of the power, but only upon the exercise by the donee of the power of appointment.

As was said by Judge Gray in *People ex rel. Eisman* v. *Ronner* (185 N. Y., 286):

"The power of the State in its sovereign ca-
"pacity to impose taxes is unlimited in extent,
"so far as no constitutional guaranty is in-
"fringed upon, and is controlled only by the
"considerations of wisdom and policy, to be,
"reasonably, expected of a legislative body,
"acting upon the interests of its constituents.
"In the raising of revenues for the needs of
"government, the power may be exercised upon
"every occupation, every object of industry, or
"enjoyment, and every species of possession.

> "The purpose of a system of taxation; the apportionment of a tax and the property, or persons to be affected are matters within the legislative discretion." (Page 290.)

This amendment cannot violate the Constitution of the United States unless, as is pointed out by plaintiffs in error in their Assignment of Errors, it impairs the obligation of a contract between William B. Astor and the plaintiffs in error, made prior to the passage and enactment of the statute, and unless also, that it deprives the plaintiffs in error of their property without due process of law, and denies to them the equal protection of the laws.

AS TO THE FIRST ASSIGNMENT OF ERROR, THAT SAID STATUTE IMPAIRS THE OBLIGATION OF A CONTRACT BETWEEN WILLIAM B. ASTOR AND THE PLAINTIFFS IN ERROR.

The deeds made by William B. Astor did not constitute a contract between him and these plaintiffs in error. They were not mentioned therein except as a class. If any of them died their places were to be taken by their issue or other persons designated. If Laura Astor Delano exercised the power of appointment given to her they might all except one be cut off from any participation in said property. The right was absolute in said Laura Astor Delano to cut them off. This being so, it cannot be seriously argued that there was any contract between them and the grantor of the power. An agreement that A will give something to B, but which is contingent upon the exercise of the right of C to divert it at will from B and give it to D, can hardly be said to create a contract.

Again, if there could be said to be any such contract as to any of the plaintiffs in error by reason

of such deeds, it was subject to the right of Laura Astor Delano, created by the same instruments, to appoint and give the property to some one else.

AS TO THE SECOND ASSIGNMENT OF ERROR THAT THIS STATUTE DEPRIVED THE PLAINTIFFS IN ERROR OF THEIR PROPERTY WITHOUT DUE PROCESS OF LAW.

As to this claim attention is called to the opinion of Judge Gray in *People ex rel. Eisman* v. *Ronner* (185 N. Y., 293), where he said:

> "The provisions of the fourteenth amend-
> "ment of the Federal Constitution, so fre-
> "quently invoked with such irrelevance as to
> "suggest the existence of considerable confu-
> "sion of thought as to its intended scope, are
> "appealed to and the argument is made that
> "the mortgagee has no opportunity for a hear-
> "ing upon the value of the debt and the mort-
> "gage. *Taking property under the taxing*
> "*power is taking it by due process of law.* In
> "such a case, due process of law does not mean
> "some judicial proceeding. * * * Due pro-
> "cess of law and the equal protection of the
> "laws are secured, if the law operates alike
> "upon all who are similarly situated and if it
> "does not subject the person to an arbitrary
> "exercise of the powers of government. (See
> "*McMillan* v. *Anderson*, 95 U. S., 37; *Duncan*
> "v. *Missouri*, 152 ib., 377.) The provision for
> "due process of law has no application to such
> "a case as this, where the relator's property
> "has been taken under the form of a tax im-
> "posed by an act of the legislature."

This was an action to test the validity of the act passed by the legislature of the State of New York in 1905 (Chap. 729) entitled "An Act to amend the Tax Law in relation to the taxation of debts secured by mortgages."

In *United States* v. *Perkins* (163 U. S., 625) the appeal was from an order assessing an inheritance tax upon property bequeathed by the testator to the United States, and the question was whether it was within the power of the State to tax bequests to the United States, and the Court said, at page 628:

> "Thus the tax is not upon the property, in "the ordinary sense of the term, but upon the "right to dispose of it, and it is not until it has "yielded its contribution to the State that it "becomes the property of the legatee."

And at page 627:

> "While the laws of all civilized States rec- "ognize in every citizen the absolute right to "his own earnings, and to the enjoyment of his "own property, and the increase thereof, dur- "ing his life, except so far as the State may "require him to contribute his share for public "expenses, the right to dispose of his property "by will has always been considered purely a "creature of statute and within legislative "control."

In *McMillan* v. *Anderson* (95 U. S., 37) the Court construed a statute of the State of Louisiana, in relation to licensing dealers in liquors, where it was claimed that the act deprived plaintiff of his property without due process of law, and the Court said, at page 41:

> "The mode of assessing taxes in the States "by the Federal government, and by all gov- "ernments, is necessarily summary, that it "may be speedy and effectual. By summary is "not meant arbitrary, or unequal, or illegal. "It must, under our Constitution, be lawfully "done.
>
> "But that does not mean, nor does the phrase "'due process of law' mean, by a judicial pro- "ceeding. The nation from which we inherit "the phrase 'due process of law' has never "relied upon the courts of justice for the col-

"lection of her taxes, though she passed "through a successful revolution in resistance "to unlawful taxation."

In *Duncan* v. *Missouri* (152 U. S., 377) it was held that "due process of law and the equal pro- "tection of the laws are secured if the laws operate "on all alike, and do not subject the individual "to an arbitrary exercise of the powers of "government."

In *United States* v. *Fox* (94 U. S., 315) the facts were: In February, 1870, Charles Fox, of the City of New York, died possessed of certain real and personal property, situated in the State of New York. By his will he left the whole of it to the United States government for the purpose of assisting to discharge the debt created by the War of the Rebellion. The infant heirs of testator contested the will and it was held inoperative and void as a devise of real estate; that the United States could not lawfully take and hold the real estate as devisee under the will, in trust or otherwise, and that it descended to the heirs. As to the personal estate the will was valid. Upon appeal to this Court, Mr. Justice Field, at page 320, said:

"The power of the State to regulate the "tenure of real property within her limits, and "the modes of its acquisition and transfer, and "the rules of its descent, and the extent to "which a testamentary disposition of it may "be exercised by its owners, is undoubted. It "is an established principle of law, everywhere "recognized, arising from the necessity of the "case, that the disposition of immovable prop- "erty, whether by deed, descent or any other "mode, is exclusively subject to the govern- "ment within whose jurisdiction the property "is situated. * * * Statutes of Wills, as is "justly observed by the Court of Appeals, are "enabling acts, and prior to the statute of

"32 Hen. VIII, there was no general power at "common law to devise lands. * * * Every "person must, therefore, devise his lands in "that State within the limitations of the stat- "ute or he cannot devise them at all. His "power is bounded by its conditions."

An inheritance tax is not one upon property, but one on the succession.

The right to take property by devise or descent is the creature of the law, and not a natural right — a privilege, and therefore the authority which confers it may impose conditions upon it.

Magoun v. *Illinois Trust & Savings Bank,* 170 U. S., 283-288.
United States v. *Perkins,* 163 U. S., 625.
In re Cullom, 145 N. Y., 593.
Wallace v. *Myers,* 38 Fed. Rep., 184.
Matter of Hoffman, 143 N. Y., 327.

In *Mager* v. *Grima* (8 How. [U. S.], 490) there was considered the validity of a law of Louisiana imposing a tax of ten per cent upon legacies, when the legatee was neither a citizen of the United States nor domiciled therein.

Mr. Chief Justice Taney said:

"Now the law in question is nothing more "than an exercise of the power which every "State and sovereignty possesses, of regulat- "ing the manner and term upon which prop- "erty, real or personal, within its dominions "may be transmitted by last will and testa- "ment, or by inheritance; and of prescribing "who shall and who shall not be capable of "taking it. Every State or nation may un- "questionably refuse to allow an alien to take "either real or personal property, situated "within its limits, either as heir or legatee, "and may, if it thinks proper, direct that prop- "erty so descending or bequeathed shall belong

"to the State. * * * And if a State may "deny the privilege altogether, it follows that, "when it grants it, it may annex to the grant "any conditions which it supposes to be re- "quired by its interests or policy."

In *Plummer* v. *Coler* (183 U. S., 115) the question was whether under the inheritance tax laws of the State of New York, a tax might be validly imposed on a legacy consisting of United States bonds issued under a statute declaring them to be exempt from State taxation in any form, and it was held that the tax is not a tax upon the property itself, but upon its transmission by will or by descent.

In the *Matter of Dows* (167 N. Y., 227) the facts were these: David Dows, Sr., died March 30th, 1880, leaving as a part of his estate a valuable piece of real property, which he devised to his trustees in trust to pay the income to his son, David Dows, Jr., during life, "And upon the death of my said son the said property, with all accumulations of interest, income and profits shall vest absolutely, and at once, in such of his children him surviving, and the issue of his deceased children as he may by his last will and testament designate and appoint, and in such manner, and upon such terms as he may legally impose. But in case my said son David Dows, Jr., die intestate, then said property, with all accumulations of interest, income and profits shall vest absolutely and at once in his children him surviving, share and share alike, and the issue of his deceased children (such issue to take share and share alike the portion which the parent would have received if living) to be paid to them at the times and in the proportion following, to wit," etc.

A similar devise was made of a share of the testator's residuary estate. The will gave the trus-

tees a power of sale over the real property, which was exercised during the life of David Dows, Jr., and a large portion of the proceeds invested in the stocks of corporations. David Dows, Jr., died January 13, 1899, leaving a will by which he exercised the power of appointment given him by the will of his father, in favor of his three sons.

The Court of Appeals, by Cullen, J., said:

"The first objection raised to the order of "the Surrogate's Court is that the tax imposed "under the amendment of April 16th, 1897 "(Chap. 284), to the Taxable Transfer Act of "1896, upon transfers made under a power of "appointment, is a tax on property and not on "the right of succession, and that, therefore, "so much of the fund as was invested in in-"corporated companies liable to taxation on "their own capital and in certain bonds of the "State of New York and bonds of the City of "New York exempt from taxation by statute, "was not subject to the tax.

"On this question we are concluded by the "previous decisions of this Court (*Matter of "Vanderbilt,* 163 N. Y., 597; affirmed on opin-"ion of Justice Patterson below in 50 App. "Div., at p. 246); and little need be said now "thereon. * * *

"*But whatever be the technical source of title "of a grantee under a power of appointment, "it cannot be denied that in reality and sub-"stance it is the execution of the power that "gives to the grantee the property passing "under it.* The will of Dows, Sr., gave his son "a power of appointment to be exercised only "in a particular manner, to wit, by last will "and testament. If, as said by the Supreme "Court of the United States, the right to take "property by devise is not an inherent or natu-"ral right, but a privilege accorded by the "State, which it may tax or charge for, it fol-"lows that the right of a testator to make a "will or testamentary instrument is equally a "privilege and equally subject to the taxing "power of the State.

"When David Dows, Sr., devised this prop-
"erty to the appointees under the will of his
"son, he necessarily subjected it to the charge
"that the State might impose on the privilege
"accorded to the son of making a will. That
"charge is the same in character as if it had
"been laid on the inheritance of the estate of
"the son himself, that is, for the privilege of
"succeeding to property under a will. * * *
"As we have held that it is the execution of
"that power which subjects grantees under it
"to the transfer tax, it follows that the condi-
"tion or form of the property at the time of
"such execution must control."

This case was taken to the Supreme Court of the United States under the title of *Orr* v. *Gilman* (183 U. S., 278), and this Court by Mr. Justice Shiras said:

"It is claimed that, under the law of the
"State of New York as it stood at the time of
"his death in 1890, David Dows, Senior, had a
"legal right to transfer, by will, his property
"or any interest therein, to his grandchildren,
"without any diminution, or impairment, then
"imposed by the law of the State upon the
"exercise of that right; that his said grand-
"children acquired vested rights in the prop-
"erty so transferred, and that the subsequent
"law, whose terms have been above tran-
"scribed, operates to diminish and impair
"those vested rights. In other words, it is
"claimed that it is not competent for the State,
"by a subsequent enactment, to exact a price,
"or charge for a privilege lawfully exercised
"in 1890, and to thus take from the grandchil-
"dren a portion of the very property the full
"right to which had vested in them many
"years before.
"We here meet, in the first place, the ques-
"tion of the construction of the will of David
"Dows, Senior. Under and by virtue of that
"will, did the property, whose transfer is
"taxed, pass to and become vested in the
"grandchildren, or did the property not be-
"come vested in them until and by virtue of

"the will of David Dows, Junior, exercising "the power of appointment? The answer to "be given this question must, of course, be "that furnished us by the Court of Appeals in "this case. (Matter of Dows, 167 N. Y., 227.)"

Then follows a quotation from the opinion of Judge Cullen, and Mr. Justice Shiras continued:

"While it is settled law that this Court will "follow the construction put by the State "Courts upon wills devising property situated "within the State, and while it is also true "that we adopt the construction of its own "statutes by the State courts, a question may "remain whether the statute, as so construed, "imports a violation of any of the rights se- "cured by applicable provisions of the Con- "stitution of the United States. And such is "the contention here.

"This Court has no authority to revise the "statutes of New York upon any grounds of "justice, policy or consistency to its own Con- "stitution. Such questions are concluded by "the decision of the legislative and judicial "authorities of the State."

After citing some authorities, the opinion continues:

"In the light of the principles thus estab- "lished we are unable to see in this legislation "of the State of New York, as construed by "its highest Court, any infringement of the "salutary provisions of the Fourteenth "amendment. There are involved no arbitrary "or unequal regulations, prescribing different "rates of taxation on property or persons in "the same condition. The provisions of the "law extend alike to all estates that descend "or devolve upon the death of those who once "owned them. * * * The Court of Appeals "held that it was the execution of the power "of appointment which subjected grantees "under it to the transfer tax. This conclusion "is binding upon this Court in so far as it "involves a construction of the will and of the

"statute. Nor are we able to perceive that
"thereby the plaintiffs in error were deprived
"of any rights under the Federal Constitution.
"The rule of law laid down by the New
"York Courts is applicable to all alike, and
"even if the view of the Court of Appeals re-
"specting the question was wrong, it was an
"error which we have no power to review."

In *Matter of Vanderbilt* (50 App. Div, 246; affirmed upon the opinion of Appellate Division in 163 N. Y., 597).

William H. Vanderbilt died in 1885 and his will was proved in December of that year. A trust fund was created for his son, Cornelius, for life. Testator directed that upon the death of Cornelius the fund should be paid to his lawful issue in such shares or proportions as Cornelius might by his last will have directed or appointed, and in default of such appointment, the gift is made directly to the issue with an altenative disposition on failure of such issue.

Cornelius Vanderbilt died in 1899, leaving a will by which he exercised the power of appointment given by the will of his father.

At the time of the death of William H. Vanderbilt, this fund, or the right of possession of it, was not taxable.

The question was as stated by Judge Patterson:

"Is the right of succession to the trust fund
"created by the will of William H. Vanderbilt
"and as to which a power of appointment was
"given to the testator's son Cornelius Vander-
"bilt, subject to the imposition of a transfer
"tax under the provisions of Chapter 284 of
"the Laws of 1897?"

And he said at page 251:

"The exact situation of the fund in this case
"as affected by the question is the following:
"For purposes of general construction and the

"derivation of title to the fund as it now "stands, the gift of the remainder comes under "the will of William H. Vanderbilt. When he "died, the law as it then existed made no pro- "vision for the taxation to the ultimate right "of succession to the fund. The legal title to "it upon the probate of his will was in his "executors until they accounted in the Surro- "gate's Court, constituted the funds out of "the assets of the estate, and transferred it "from themselves as executors to themselves "as trustees, which we assume in this case "was done. Then they held the fund still "under the will but undistributed and finally "undistributable until the power of appoint- "ment was exercised by Cornelius Vanderbilt.

"Meantime, and while they held it so un- "distributed in fact, the State, in the exercise "of its general power of taxation, found it "expedient to tax the right to the succession, "which right had not theretofore been taxed, "making the transfer consist in that act by "which each of the appointees became entitled "to claim and to receive the particular or spe- "cific distributive share allotted to him. Of "the general power of the State to fix the time "at which the right of succession shall be "taxed, and to define what shall be a transfer "within the meaning of that act, we have no "doubt, so long as that definition does not in- "volve a violation of either contract or vested "rights, and, as we have said, no contract re- "lation was established by the act of "1885. * * *

"If the right of succession to this fund was "taxable, as we think it was, the legislature "had the power to declare that the tax should "be imposed as of the time at which the right "to possession of the amount appointed of the "fund to each of the remaindermen became "fixed and determined by the exercise of the "power of appointment."

FOURTH POINT.

The amendment of 1897 was a tax upon the exercise of a power of appointment.

Matter of Swift, 137 N. Y., 77.
In re *Cullom,* 145 N. Y., 593.
Matter of Hoffman, 143 N. Y., 237.
Knowlton v. *Moore,* 178 U. S., 41.
Strode v. *Commonwealth,* 52 Penn. St., 181.

The legislature had the unquestioned right to enact this amendment.

In this case the power was exercised by will.

> "The privilege of making a will is not a "natural or inherent right, but one which the "State can grant or withhold in its discretion. "If granted, it may be upon such conditions "and with such limitations as the legislature "sees fit to create. * * * The legislature "could provide that no power of appointment "should be exercised by will or that it should "be exercised only upon the payment of a gross "or ratable sum for the privilege. It could ex- "act this condition, independent of the date "or origin of the power."
>
> Opinion of Vann, J., *Matter of Delano,* 176 N. Y., 486.

If the amendment had read: "Whenever any person or corporation shall exercise a power of appointment derived from any disposition of property made either before or after the passage of this act, such appointment when made shall be * * * taxable under the provisions of this act" it would have made all such appointments taxable.

It was not necessary to the validity of the act to say that such appointment "shall be deemed a transfer taxable under the provisions of this act."

Nor was it necessary to its validity to add "in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power and had been bequeathed or devised by such donee by will."

As is shown above the legislature had the right to control or regulate the making of a will or to provide that it should not be made, or that no power of appointment could be exercised except upon the payment of a sum fixed for the privilege.

Matter of Delano, 176 N. Y., 486.
Orr v. *Gilman,* 183 U. S., 278.

The words "in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power and had been bequeathed or devised by such donee by will," only referred to the manner in which the tax should be imposed or fixed and did not change in any respect the nature or character of the thing to be taxed, viz., the exercise of the power of appointment. When this power of appointment was given by William B. Astor to his daughter, he necessarily subjected it to the charge that the State might impose on the privilege accorded to her of making a will.

Matter of Delano, 176 N. Y., 486.

Plaintiffs in error at page 50 of brief say that this amendment of 1897 changes the power of appointment given to Mrs. Delano and gives her "power to dispose of only 95 per cent of the remainder, giving the other 5 per cent to the state."

If this was sound reasoning every inheritance tax law would be unconstitutional.

But this is not a statement of the fact. Mrs. Delano had the power to appoint the whole estate, and after the appointment was made it became taxable by reason of the exercise of such appointment.

The fact that this is not a correct statement of the proposition is proven by considering what the result upon the property would be if Mrs. Delano had not exercised the power of appointment. The property would have remained intact. No part of it would have passed to the State.

The plaintiffs in error derive their respective rights in and to the property herein under the will of Laura Astor Delano, and they have not rejected the will or claimed the property under the deeds made by William B. Astor.

As is said by Judge Vann in his opinion (*Matter of Delano*): "He is compelled to resort to the will in order to establish his right, for the deed alone will not suffice."

In *Matter of Lansing* (182 N. Y. 238), cited by plaintiffs in error. Under a will taking effect in 1869 the testator devised certain property to trustees for each of his children living at the time of his death, to hold the portion of each child in severalty, in trust during the life of such child, and after the death of such child her portion to go to her heirs-at-law, subject to the power of such child to devise the remainder by will to the heirs-at-law and collateral relatives of such child, the exercise of the power given by such will to a daughter who died in October, 1904, leaving a will whereby she devised her share of her father's estate to her daughter, her only child and heir-at-law, and who was in being at the death of her grandfather in 1869, transfers nothing that was not given to her daughter by the will of her grandfather. At his death she took a vested interest in remainder; her rights were fixed by him subject, however, to be defeated by the exercise of a power of appointment which changed them, not by one which left them precisely as they existed under his will, and therefore it must be regarded

as a nullity; there was no transfer to her under the will of her mother, but under the will of her grandfather and at that time there was no statute imposing a transfer tax.

The imposition of such a tax upon the theory that the trust property was transferred by the will of her mother, cannot be sustained, especially when she disclaims deriving any title under the power and elects to reject it from that source.

This case is an authority for defendants in error upon the point discussed herein that no contract is created in favor of the remainderman; that while she took a vested interest the same was subject to be defeated by the exercise of the power of appointment.

If the power of appointment was exercised her rights might be changed.

If the power of appointment was not exercised, there would be no tax, but it was held that the exercise of a power of appointment which left her rights the same as though the power had not been exercised was a nullity. And in this case the daughter disclaimed any rights under the will of her mother.

In *Matter of Pell* (171 N. Y., 48), testator died in 1863 giving a life estate in all his property to his widow, with remainders over at her death to his nephews and nieces and the issue of any deceased nephew or niece, together with a share to his sister. The life tenant died December 20, 1899, at which time all the estates in remainder came into the actual possession of the beneficiaries under the will. Held, that chapter 76 of the Laws of 1899, imposing a transfer tax upon remainders vesting prior to June 30, 1885, was unconstitutional, because there had been a complete vesting of the residuary estate before the passage of the act.

The appellants in error at page 44 discuss the proposition that an appointment cannot be treated

as a succession because the appointed property does not belong to the donee of the power, and the cases cited thereon seem to bear out that view, but at the time such cases were decided there was no provision of law for the taxing of the exercise of powers of appointment.

Matter of Stewart (131 N. Y., 274) and *Matter of Harbeck* (161 N. Y., 211) and the other cases cited hold that a party who takes by a power of appointment given under a will, takes under and by virtue of the will, and if the will took effect before the enactment of the transfer tax law the bequests are not subject to any tax.

But, as the amendment of 1897 was enacted since these decisions, they are not in point.

In *Watson* v. *Bonney* (2 Sandf., 405-416), cited on page 54 of brief of plaintiffs in error, Mrs. Watson, in contemplation of her marriage, made a deed to Bonney, as trustee, of all her property, real and personal, to which Watson, who was to be her husband, was a party. She reserved to herself the income during life, and also the power of disposing of the estate by an instrument in the nature of a will. In case of her decease without making a disposition, the trustee should transfer the estate to such persons as would be the legal representatives of plaintiff.

After the act of 1848 she brought this action to set aside the trust deed. At this time she was married and had three children. The Court held that the effect of the act of 1848, which provided that the real and personal property of any married female shall not be subject to the disposal of her husband, but shall be her sole and separate property as if she were single, was not to enable married women to destroy their marriage settlements, and

used the language stated in plaintiff's brief, but this does not affect the case at bar.

The argument of plaintiffs in error as to contracts having been created in favor of these plaintiffs in error by the deeds of William B. Astor is answered fully in the opinion of the Court of Appeals (*Matter of Delano,* 176 N. Y., 486):

> "The existence of the power is the important "fact, for what may be done under it is not "affected by its origin. If created by deed its "efficiency is the same as if it had been created "in the same form by will. No more and no "less could be done by virtue of it in the one "case than in the other. * * * The power, "however or whenever created, authorized the "donee by her will to divest certain defeasible "estates and to vest them absolutely in one per-"son. * * * The statute applies to all "powers alike, without distinction on account "of the method of creation or the date of cre-"ation, and provides that the exercise of the "power shall be deemed a taxable transfer of "the property affected, the same as if it had be-"longed absolutely to the donee of the power "and had been bequeathed or devised by such "donee. * * *
>
> "Such was the effect of the exercise of the "power under consideration, for it both re-"voked and created estates in the real prop-"erty and interests in the personal property.
>
> "No tax is laid on the power, or on the prop-"erty, or on the original disposition by deed, "but simply upon the exercise of the power "by will, as an effective transfer for the pur-"poses of the act."

FIFTH POINT.

The order of the Surrogate's Court of New York County should be affirmed.

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